IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-278

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL.,
Petitioners

v.

AMERICAN BANKERS ASSOCIATION, ET AL.

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Petitioners

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., *Petitioners*

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR RESPONDENT INDEPENDENT BANKERS ASSOCIATION OF AMERICA IN OPPOSITION

Of Counsel:

HORACE R. HANSEN
HANSEN, DORDELL & BRADT
600 Degree of Honor Bldg.,
St. Paul, Minnesota 55101

MEYER EISENBERG
LEONARD J. RUBIN
CHRISTINE E. CARNAVOS

LAWLER, KENT & EISENBERG
1300 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 293-2240

Counsel for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-278

LAWRENCE CONNELL, CHAIRMAN OF THE NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL., *Petitioners*

v.

AMERICAN BANKERS ASSOCIATION, ET AL.

FEDERAL HOME LOAN BANK BOARD, ET AL., *Petitioners*

v.

INDEPENDENT BANKERS ASSOCIATION OF AMERICA

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., *Petitioners*

v.

UNITED STATES LEAGUE OF SAVINGS ASSOCIATIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR RESPONDENT INDEPENDENT BANKERS ASSOCIATION OF AMERICA IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which is not reported, is attached as Appendix A to the Petition. The

opinion of the United States District Court for the District of Columbia in *Independent Bankers Association of America* v. *Federal Home Loan Bank Board, et al.*, also unreported, is attached as Appendix E to the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether utilization of off-premise computer terminals by customers of federal savings and loan associations for withdrawal and transfer of savings funds violates the express statutory prohibitions in Section 5(b)(1) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(b).

STATUTES AND RULING INVOLVED

The relevant provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464, are attached as Appendix F to the Petition. The regulation of the Federal Home Loan Bank Board, 12 C.F.R. 545.4-2, is attached as Appendix F to the Petition.

STATEMENT

The three cases which are the subjects of the Petition,[1] were disposed of by the court of appeals in a single opinion and judgment, entered on April 20, 1979. The cases were not consolidated and were separately briefed, but by order of the court, were argued successively before the same panel on the same day. Although in its opinion the court of appeals cited factual and legal similarities among the three cases, it dealt with the challenged regulation in each case separately and specifically.

[1] *American Bankers Association* v. *Connell, et al.*, ("Credit Union appeal"); *IBAA* v. *Federal Home Loan Bank Board, et al.* ("Bank Board appeal"); *United States League of Savings Associations* v. *Board of Govenors of the Federal Reserve System, et al.* ("Federal Reserve Board appeal").

The court found generally that, "in each instance [fund transfers authorized by the regulations] represents the use of a device or technique which was not and is not authorized by the relevant statutes . . .";[2] and specifically that, regarding the Bank Board case, "Remote Service Units . . . are in violation of the prohibition against checking accounts contained in Section 5(b)(1) of the Home Owners' Loan Act of 1933 . . .",[3] and ordered that 12 C.F.R. § 545.4-2 (the "RSU Regulation") be vacated and set aside.

Respondent Independent Bankers Association of America ("IBAA") submits that the court's decision was correct, both generally with respect to all three cases, and specifically in the Bank Board case. The court refused to confine itself to viewing the cases as isolated instances in which only the literal language of the relevant statutes was interpreted. Rather, the court examined the legislative history of the creation of each of the three types of financial institutions in the three cases, as well as the legislative history of each of the challenged regulations, and determined that the original statutory scheme of specialization of financial institutions was being frustrated, without benefit of Congressional consideration.

[2] Pet. App. A, 2a-3a.

[3] Pet. App. A, 3a-4a.

The court declined to rewrite statutory language to accommodate the regulations, and refused to make policy judgments concerning overall public interest. The court came to only one conclusion: the methods of funds transfer authorized by regulation in each case was beyond the statutory authority of the regulators. By staying the effective date of its Order, the court offered Congress the opportunity to consider providing that authority. Because the court of appeals was correct in its assessment of the facts and law in each of the cases, and because there is no contrary appellate authority, its comprehensive decision should not be disturbed.

ARGUMENT

I. The Decision Below Is Correct—RSU Withdrawal and Transfer Transactions Are Checking Account Transactions Within The Language and Intent Of The Statutory Prohibition

The issue presented to the court of appeals in the Bank Board case was whether the Bank Board had exceeded its statutory authority in authorizing federal savings and loan associations ("FSL's") to establish a means by which customers may withdraw and transfer funds on deposit in FSL savings accounts at locations other than authorized FSL offices. IBAA argued that (1) the authority given FSL's by the RSU Regulation was in clear conflict with the statutory purposes of FSL's as expressed in Section 5(a) of the Home Owners' Loan Act of 1933 ("HOLA"); and (2) RSU type transactions are specifically prohibited to FSL's by the prohibition against checking accounts in Section 5(b)(1) of the HOLA.

The court specifically found that RSU's permit transactions by "a device functionally equivalent to a

check", and were therefore prohibited by the express prohibition against checking accounts in Section 5(b)(1) of the HOLA. This finding was based on a reading of the specific language and intent of the prohibition, against the background of (1) the legislative history of the creation of FSL's; (2) the legislative history of the prohibition; and (3) a practical understanding of the way in which modern technology has changed the form of delivering traditional financial services, without changing the substance.

The undisputed facts established that the results achieved by the use of RSU's were contrary to the statutory purposes of FSL's, and inconsistent with the overriding policy considerations expressed by Congress in Section 5(a) of the HOLA. RSU's permit FSL's to offer deposit accounts which are substantively the same as prohibited bank checking accounts. In a 1968 amendment to Section 5(b)(1) of the HOLA, Congress expressly reiterated its prohibition against checking accounts for FSL's. The Board's attempt to circumvent that express prohibition failed because it relied only on the form of an RSU transaction rather than its substance.

The use of RSU's permits FSL's to offer services which they have never before offered. Through the use of RSU's, FSL customers may order withdrawal and transfer of, and receive savings funds at places other than FSL offices. Like bank checking account customers, FSL customers may receive cash withdrawals from merchants, or may pay for goods or services at the point of sale by permitting the FSL to pay the merchant out of funds withdrawn from the customer's FSL savings account. This service is virtually indistinguishable from that offered bank customers through

use of identical electronic funds transfer terminals, services which have been found to be the functional equivalent of checking account services.

The Bank Board argued that in 1933 Congress gave the Board discretionary authority broad enough to effect this revolutionary change by administrative regulation. The court found this argument contrary to the history of the development of separate specialized financial institutions, and the separate statutory authority Congress expressly granted to each.

Alternatively, the Board argued that in the last phrase of the last sentence in the 1968 amendment to Section 5(b)(1) of the HOLA, Congress affirmatively granted the Board the authority to permit the use of RSU's. The Board made this argument without any case authority, and without a single supporting reference to a single Congressional document or report, and in the face of overwhelming contrary evidence.

The restrictive language in Section 5(b)(1) of the HOLA was clearly intended to maintain the permanent distinction between FSL's and commercial banks, by expressly denying FSL's the authority to offer customers the ability to effect withdrawal and transfer of savings funds on demand at places other than FSL offices. RSU's are intended to, and do, make FSL savings funds accessible at virtually any location, in the same way as checking account funds. The "check" is merely the means used by banks to attain the desired objective of payment of funds to its customer. The plastic card used in an RSU transaction serves the same purpose. RSU's offer the same service of immediate access to customer accounts in a manner dispensing with underlying paper such as checks.

Petitioner argues that the court erred in not relying on UCC definitions of "check" and "negotiable instrument" in analyzing an RSU electronic funds transfer ("EFT") transaction. The applicability of the UCC and the functional equivalence of EFT transactions to commercial bank checking account transactions, was previously considered in depth by the D.C. Circuit in *IBAA* v. *Smith,* 534 F.2d 921, *cert. denied,* 429 U.S. 862 (1976), and by three other courts of appeal in identical cases.[4] All four courts unanimously held that the UCC did not apply, and that bank-operated EFT terminals[5] which effectuated withdrawals and transfers, "paid checks", although no paper instrument was used.

Although *Smith* and the other CBCT cases involved national banks, not federal savings and loan associations, they did involve: (1) routine financial transactions accomplished at EFT terminals; (2) a necessary judicial interpretation of Congressional intent in for-

---

[4] *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins,* 394 F.Supp. 979 (D. Colo., 1975), *aff'd. in part, rev'd. in part,* 540 F.2d 497 (C.A. 10, 1976), *cert. denied,* 429 U.S. 1091 (1977); *Missouri ex rel. Kostman* v. *First National Bank in St. Louis,* 405 F.Supp. 733 (E.D. Mo., 1975), *aff'd.,* 538 F.2d 219 (C.A. 8), *cert. denied,* 429 U.S. 941 (1976); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.,* 409 F.Supp. 1167 (N.D. Ill., 1975), *aff'd. in part, rev'd. in part,* 536 F.2d 176 (C.A. 7), *cert. denied,* 429 U.S. 871 (1976).

[5] Bank-operated EFT terminals, generically, are called "Customer-Bank Communication Terminals," or "CBCT's", and are more commonly known as "24-Hour Tellers." A transaction accomplished at an RSU of a federal savings and loan association is identical to a transaction accomplished at a CBCT of a commercial bank. The same manufacturers supply the same terminal equipment, and any differences are due only to individual institutional programming, not to the type of institution using the terminal. In fact, very often a FSL will "share" an EFT terminal with a commercial bank, allowing customers of both institutions equal access.

mulating relevant statutory prohibitions; and (3) public policy considerations related to electronic funds transfer. Those cases were clearly relevant for the manner in which the courts analyzed the functional nature of an EFT transaction, and the way the relevant statute was applied to the substance of the transaction, giving primary consideration to Congressional intent. In this case, the court was again asked to analyze the functional nature of an identical EFT transaction and apply to it the relevant statute in light of Congressional intent.

The issue in the CBCT cases, as in this case, was whether the substance of the express Congressional restriction was being violated by the regulatory agency through use of EFT. Consistently, the courts in all cases held that it was.

The majority of the Bank Board's arguments were devoted to justifying the necessity for the RSU Regulation, rather than supporting its legality. Unable to sustain the legality of the Regulation, the Board relied instead on the usefulness and attractiveness of the RSU services to consumers, and on the alleged need for federal savings and loans to offer these services to effectively compete with commercial banks. To the same effect is the argument by *amicus curiae* San Diego Federal Savings and Loan Association.

The alleged competitive necessity for the Board's action in adopting the RSU Regulation was, however, not at issue. As the court recognized, those are arguments for statutory amendment, and are better addressed to the Congress. The issue is the present statutory authority of the Board to permit FSL's to offer checking account services through use of RSU's and,

as the court found, that authority is simply not presently contained in the HOLA. No amount of justification based on the need for, or value of these services can substitute for that lack of statutory authority, nor can it overcome specific Congressional intent to prohibit the offering of those services.

II. Congress Is Considering Enabling Legislation

Petitioner has informed the Court that there are two bills introduced in Congress which propose to expressly sanction RSU transactions for FSL's, as well as share drafts for federal credit unions and automatic transfer services for commercial banks. (Pet. brief, p. 19, fn. 6.) H.R. 4986, 96th Cong., 1st Sess. (1979) ("Consumer Checking Account Equity Act of 1979"), was passed by the House on September 10, 1979. Section 4 of the bill amends Section 5(b)(1) of the HOLA by adding a concluding sentence: "This section does not prohibit the establishment of remote service units by associations in accordance with regulations prescribed by the Board."

Three companion bills have been introduced in the Senate, all of which would expressly sanction RSU's and the other services, by statutory amendment. S. 1347, S. 1729, S. 1627, 96th Cong., 1st Sess. (1979).

The court set aside the regulations in all three cases for the same reason. Namely, that offering the challenged services required Congressional, not administrative, authorization. The court stayed the effectiveness of its Judgment until 1 January 1980, "in the expectation that the Congress will declare its will upon these matters." Should enabling legislation be enacted by Congress and signed by the President prior

to the expiration of the stay, the issue in this case will be moot. Should no statutory amendment become law prior to the expiration of the stay, then Congress has, after consideration, decided to allow the Bank Board and the other agencies to accept the consequences of the court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

MEYER EISENBERG
LEONARD J. RUBIN
CHRISTINE E. CARNAVOS

LAWLER, KENT & EISENBERG
1300 Nineteenth St. N.W.
Washington, D.C. 20036
(202) 293-2240

Counsel for Respondent
Independent Bankers Association
of America

Of Counsel:

HORACE R. HANSEN
HANSEN, DORDELL & BRADT
600 Degree of Honor Building
St. Paul, Minnesota 55101

September 21, 1979

Certificate of Service

I hereby certify that three copies of this document were mailed, postage prepaid, in accordance with the provisions of Rules 33.1 and 33.2(a) of the Rules of the United States Supreme Court, to each of the individuals listed below, this 21st day of September, 1979:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

William H. Smith, Esq.
1120 Connecticut Avenue
Washington, D.C. 20036

Daniel J. Goldberg, Esq.
1800 M Street, N.W.
Suite 950-N
Washington, D.C. 20036

R. R. McMahan, Esq.
115 South LaSalle Street
Chicago, Illinois 60603

Douglas M. Rawlings, Esq.
McKenna & Fitting
Twenty-Eighth Floor
3435 Wilshire Boulevard
Los Angeles, California 90010

Frederick M. Haden, Esq.
8150 Leesburg Pike, Suite 503
Vienna, Virginia 22180

Ralph S. Swoboda, Esq.
1617 Sherman Avenue
Madison, Wisconsin 53710

LEONARD J. RUBIN